***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

# 76-7367

ORIGINAL

*To be argued by*
MARTIN J. McHUGH

## United States Court of Appeals
FOR THE SECOND CIRCUIT

VITO VALENTINO,
*Plaintiff-Appellee,*

*against*

RICKNERS RHEDEREI, G.M.B.H., SS ETHA,
*Defendant,*

*and*

JOHN W. McGRATH CORPORATION,
*Intervenor-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF ON BEHALF OF INTERVENOR-APPELLANT JOHN W. McGRATH CORPORATION**

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### Statement

This action was originally instituted by Vito Valentino ("Valentino") against defendant for personal injuries he suffered while working aboard defendant's vessel as a longshoreman. Valentino was then in the employ of the Intervenor-Appellant, John W. McGrath Corporation ("McGrath").

In consequence of his injury, McGrath paid Valentino medical and compensation benefits under the provisions of

the Longshoremen's and Harbor Worker's Compensation Act, as amended 33 USC 901 et seq. ("Act") in the total amount of $15,488.31 ("Lien").

The suit was tried to Honorable Jack B. Weinstein, U.S.D.J. and a jury and resulted in a verdict in favor of Valentino in the amount of $5,000.00. A judgment on the verdict together with costs was entered on April 24, 1975 (2a).[1]

McGrath asserted a claim against the proceeds of the judgment for its Lien and plaintiff's attorney asserted a claim for his fee in prosecuting Valentino's claim to judgment. Since the proceeds of the judgment were insufficient to satisfy the claims of both McGrath and Valentino's attorney, defendant sought and was granted leave to deposit the amount of the judgment into the Registry of the Court (2a). Counsel for the plaintiff then moved for an order awarding him a fee[2] out of the proceeds of the suit and McGrath intervened to oppose Valentino's attorney's motion asserting a right of priority of the Lien on the recovery (5a).

Judge Weinstein in a Memorandum and Order (5a-21a) held that the plaintiff's attorney was entitled to a fee on the amount of the recovery and that the fee should be a first charge on the proceeds of the judgment. In effect, therefore, the Court below has held that the Lien is not entitled to priority over the claim for a fee by Valentino's attorney.

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[1] References are to pages in the Appendix. The Appendix is mislabeled and is a Joint Appendix by agreement of the parties.

[2] Pursuant to his retainer agreement with plaintiff the attorney sought $2,000.00 as a fee (5a).

## The Issue Presented

Does an employer have priority of lien for sums paid in compensation and medical benefits to an injured employee under the Act?

## ARGUMENT

### POINT I

### McGrath as an Employer has a Valid Lien Against the Proceeds of the Judgment.

Although adopted almost fifty years ago and amended on various occasions in 1938, 1959 and 1972, Congress never addressed itself to the subject of whether an employer who has paid medical and compensation benefits is entitled to a lien on the proceeds of a judgment attained by an injured employee against a third-party tort feasor. The Courts, however, dealt with the problem by creating an equitable lien in favor of the employer on the proceeds of any such suit. *The Etna* (3 Cir., 1943), 138 F.2d 37, 41; *Nacerima Operating Company* v. *Oosting* (4 Cir., 1972), 456 F.2d 956-958 (footnote 3); *Fontana* v. *Pennsylvania R. Co.* (SDNY, 1952), 106 F. Supp. 461, aff'd on opinion below, sub. nom., *Fontana* v. *Grace Line, Inc.* (2 Cir., 1953), 205 F. 2d 151, cert. den. 346 U.S. 886, 74 S. Ct. 137, 98 L. Ed. 390 (1953).

The recovery by the employer of payments made for compensation and medical benefits to an injured employee by an application of the judicially created lien on the proceeds of a recovery against a third-party tort feasor was not, historically at least, subject to a charge for collection by the employee's attorney. *Haynes* v. *Rederi A/S Alladin* (5 Cir., 1966), 362 F. 2d 345, 351; *Fontana* v. *Pennsylvania R. Co.* (supra); *Davis* v. *United States Lines* (3 Cir., 1958),

253 F. 2d 262; *Lamar* v. *Admiral Shipping Corp.* (5 Cir., 1973), 476 F. 2d 300, 303; *Russo* v. *Flota Mercante Gran Colombiana* (SDNY, 1969), 303 F. Supp. 1404; *Saviano* v. *Koninkljke Nederlandsche Stoomboot Maatschappij, N.V.* (SDNY), 1974 AMC 2188 (not reported elsewhere); *Rowson* v. *W. Bruns* (SDNY, 1976), 1976 AMC 46 (not otherwise reported) and cases cited therein.

## POINT II

### The Judicially Created Lien Has Priority Over a Claim for Attorneys' Fees.

By the 1959 Amendments to the Act, Congress provided that where an employer brought suit against a third-party tort feasor and effected a recovery it could retain from the recovery an amount sufficient to satisfy, in full, its lien for compensation and medical payments made to the injured employee as well as attorneys' fees and one-fifth of any excess over those sums. 33 *USC* § 933(e)(1). Obviously, Congress had in mind permitting an employer, when it brought the third-party suit, to make itself whole and thus preserve the resources with which it was obligated to secure to injured employees the benefits intended by the Act. Cf *Davis* v. *United States Lines* (supra).

It is clear Congress intended that an employer be reimbursed, without deduction of fees of plaintiff's counsel, for any compensation which he was obligated to pay to the injured employee out of the net proceeds of the recovery. *Cella* v. *Partenreederei MS Ravenna* (1 Cir. 1975), 529 F. 2d 15. In that case, the First Circuit noted that Congress in 1959

> ". . . was aware of the then unanimous judicial rule that the reimbursement portion of a longshoreman's recovery ordinarily is not reduced by attorneys' fees

> . . . A change in this rule which would conflict with the purposes of the enactments should come from that body." (529 F. 2d at 21.)

Congress could certainly have spoken to the issue if it intended to reward plaintiff's counsel with fees for bringing actions which resulted in no benefit to their clients. Judge Edward Weinfeld, the author of the opinion (106 F. Supp. 461) which this Court adopted, in *Fontana* v. *Pennsylvania R. Co.* (supra) had occasion to consider the problem of counsel fees following the 1972 Amendments to the Act. He concluded that the 1972 Amendments did not affect the right of an employer to be reimbursed for its lien undiminished by any counsel fees. Judge Weinfeld specifically noted that had Congress wished to change the rule it certainly was free to do so. *See Colella* v. *Waterman Steamship Co.* (SDNY, 1976), 74 Civ. 2325 (not reported).

Apparently, the Court below believed that Congress had never expressed an intent that the employer be fully reimbursed out of the net proceeds of a third party recovery and therefore felt that the Court was obligated to fashion a rule that ". . . does least violence to the statutory scheme and general principle" (20a). The difficulty with that approach is that congressional intent had been made plain by creating a statutory scheme designed to preserve to the maximum extent possible the resources of employers to meet their obligations under the Act. Thus, it is plain that Congress did not intend that these resources be spent on fees to attorneys prosecuting third party suits. If there ever was doubt about this, the 1972 Amendments to the Act puts it to rest.

The factual background leading to the 1972 Amendments are described in S. Rep. No. 92-1125 92nd Cong. 2d Sess. 4-5 (1972).

> "Since 1946, due to a number of decisions by the U.S. Supreme Court, it has been possible for an injured

longshoreman to avail himself of the benefits of the Longshoremen's and Harbor Workers' Compensation Act and to sue the owner of the ship on which he was working for damages as a result of his injury. The Supreme Court has ruled that such shipowner, under the doctrine of seaworthiness, was liable for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore on theories of express or implied warranty, thereby transferring their liability to the stevedore company, the actual employer of the longshoremen.

The social costs of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.

For a number of years representatives of the employees have attempted to have the benefit levels under the Act raised so that injured workers would be properly protected by the Act. At the same time, employer groups indicated they could do so only if the Longshoremen's and Harbor Workers' Compensation Act were to again become the exclusive remedy against the stevedore as has been intended since its passage in 1927 until modified by various Supreme Court decisions.

The bill reported by the committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and 'hold harmless' or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act."

Judge Friendly described the genesis of the 1972 Amendments in *Pittston Stevedoring Corp.* v. *Dellaventura* (2 Cir., 1976), —— F. 2d ——, 1976 AMC 881 at 885. He said:

> "Stevedores and other employers were pushing for complete abolition of the three-way damage action possible under Seas Shipping Co. Inc. v. Sieracki 328 U.S. 85 . . . which permitted the shipowner to seek indemnity for any liability thus entailed from an injured worker's employer. This . . . exposed the employer . . . to an unlimited liability to the employee for damages and to the shipowner for its counsel fees in defending the employee's suit."

The Unions, Judge Friendly wrote, which for years had been seeking increased benefits under the Act, opposed repeal of their *Sieracki* created status of "seaman" in part on the grounds that the Act's benefits were so low that workers needed the additional protection of the "unseaworthiness" doctrine.

The First Circuit in *Cella* (supra) read the congressional intent in the same way. Chief Judge Coffin, writing for the Court, pointed out that (529 F. 2d 15 at 20-21):

> "The 1972 amendments . . . were enacted as a compromise between shipowners and stevedore-employers in order to provide increased statutory compensation payments. For years the scale of compensation payments had been insufficient. Elimination of the unseaworthiness cause of action against the shipowner, and the indemnity action against the stevedore was necessary to insure adequate compensation for the increased benefits. In particular to drain the employer's resources by the attorneys' fees and expenses required to litigate the third party indemnity action was cited as an obstacle to funding adequate compensation payments. . . . we conclude that the overriding purpose

of the 1972 amendments was to strictly limit the liability of the stevedore in order to, husband its resources and its insurance carrier's resources, for payment of increased benefits under the Act.

An award of attorneys' fees out of that portion of a third party tort settlement which goes to reimburse the employer or its carrier would contravene that fundamental purpose. It would cause a reduction in the amount which the employer can legitimately call upon to fund its obligation towards injured workmen under the Act . . . we conclude, in accordance with the intent of Congress, that reimbursement funds undiminished by attorneys' fees should be available to fund the compensation of workmen whose injuries can not be charged to the tortuous conduct of third parties."[3]

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[3] The Court relied upon H. Rep. No. 92-1441, 92d Cong. 2d Sess.—3 U.S. Code, Cong. & Admin. News, pp. 4698, 4702 (1972). S. Rep. No. 92-1125, 92d Cong. 2d Sess. 9 (1972). The report in part reads: "The Committee heard testimony that the number of third-party actions brought under the Sieracki and Ryan line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third-party cases and legal expenses and higher recoveries in such cases."

## POINT III

**The Second Circuit Rule That An Attorney Who Has Not Conferred A Benefit Upon His Client Should Not Be Entitled To A Fee Is The Most Persuasive And Is Consistent With The Intent Underlying The Compensation Scheme.**

The opinion below correctly notes that Courts dealing with the subject of whether an employer's lien has priority over fees of the employee's attorney have approached the problem in different ways. The approach of this Circuit was to follow the reasoning of the Third Circuit *The Etna*, 138 F. 2d 37, 41. That reasoning was essentially that the scheme of the Act was to create an equitable right of subrogation in an employer who had paid compensation. See *Fontana* v. *Pennsylvania R. Co.* (supra).

District Courts within the Second Circuit, subsequent to the decision in *Fontana* developed the so-called benefit theory. For example, Judge Palmieri, in a case involving an issue identical to the one at bar, held that a plaintiff's attorney who has produced no benefit for his client is not entitled to a fee at the expense of the employer. *Spano* v. *N.V. Stoomvaart Maatschappij Nederland* (SDNY, 1971), 340 F. Supp. 1194. Similarly Circuit Judge Mansfield, when a District Judge, held that permitting plaintiff's attorney to recover his contingent fee for prosecuting a third-party action at the expense of the employer's lien would be to benefit the attorney only even though he had conferred no benefit upon his real client. *Russo* v. *Flota Mercante Gran Colombiana* (SDNY, 1969), 303 F. Supp. 1404.

Judge Owen in *Saviano* v. *Koninklijke Nederlandsche Stoomboot Maatschappij, N.V.* (SDNY, 1974), 1974 AMC 2188 (not otherwise reported), adopted the rule that the "lien for previously incurred compensation and medical

expenses has priority over attorneys' fees". He specifically rejected the theory espoused in *Scozzari* v. *Jade Co. Inc.* (infra).

*Spano, Russo and Saviano* were cases, where as here, the amount of the recovery did not exceed the lien. So far as is reported, the only other case where the Court dealt with a recovery less than an employer's lien was *Scozzari* v. *Jade Co. Inc.* (EDNY, 1972), 350 F. Supp. 801. In that case Judge Bartels, confronted with a situation where the plaintiff, who had maintained a third-party action, would have received nothing, gave priority to plaintiff's lawyer for his contingent fee requiring him, however, to divide his recovery with the plaintiff. The decision might be reviewed as "rough justice". It is, at best, an isolated case grounded upon what we respectfully believe are unsupported principles. In short, Judge Bartels was trying to fashion a rule which would give a plaintiff a benefit in the recovery over and above the amount of compensation and benefits he had already received from his employer. To do that the Judge had to create a fund in which plaintiff could share.

The only available means for the creation of the fund was to award the attorney a priority claim to the proceeds of the judgment. The difficulty with the approach is, as Judge Mansfield pointed out in *Russo*, that it rewards a plaintiff for bringing an action which did not, and probably by any reasonable evaluation could not have been expected to, result in a recovery in excess of the amount of the compensation already received—a dubious basis at best to support such a rule. Moreover the decision grants a double recovery to an injured worker, something that the Act expressly forbids. See S. Rep. No. 428, H. Rep. No. 229 86 Cong. 1st Sess., 2 U.S. Code Cong. & Admin. News, p. 2135 (1959).

There is no doubt that the encouragement of this kind of an approach would tend to increase litigation and add

unnecessary burdens to the compensation scheme which Congress did not intend.[4]

Circuits, other than the Second, have treated the problem in a variety of ways at different times. Prior to the 1972 Amendments to the Act, the Fourth Circuit believed that there was such a conflict of interest between the plaintiff and his employer because of the *Ryan* type indemnity possibilities, that then existed, that the employer ought not have to pay plaintiff's attorney who was, in reality, an adversary. *Ballwanz* v. *Jarka Corporation* (4 Cir., 1967), 382 F. 2d 433. That rule was abandoned by the decision in *Swift* v. *Bolten* (4 Cir., 1975), 517 F. 2d 368, in which a different panel of the Fourth Circuit expressed the view that the 1972 Amendments to the Act, which eliminated indemnity suits of the *Ryan* variety, removed the possibility of conflict between an employer and an employee. As we shall discuss later, we do not share the view that the 1972 Amendments removed all vestiges of conflict but it is significant to note that the most recent decision in the Fourth Circuit in *Swift* did not address itself to the concept that before an attorney is entitled to a fee, he should confer a benefit upon his client. More importantly, however, *Swift* does not address itself to what Congressional intent in the matter is. As we have demonstrated, Congress really intended that a priority be given to the reimbursement of employers of money expended by them in the payment of compensation and medical benefits to their injured workers. The Congressional intent is, simply, that the resources of the employer are to be preserved to be certain that all injured be absolutely assured of a given level of compensation for injuries sustained. Cf. *Cella* v. *Partenreederei MS Ravenna* (1 Cir., 1975), 529 F. 2d 15.

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[4] Although Judge Weinstein dismisses crowded dockets as a consideration in this kind of case (19a), Congress in creating the entire compensation scheme was much concerned with it. S. Rep. No. 92-1125 and H. Rep. No. 92 1441, 92d Cong., 2d Sess. U.S. Code Cong. & Adm. News, p. 4703 (1972).

The Fifth Circuit also thought that the 1972 Amendments to the Act removed the conflict problem and that fairness required that the interests of the plaintiff's attorney be protected and that he be given a fee to be shared by the plaintiff and his employer. *Chouest* v. *A & P F[illegible] Rentals, Inc.* (5 Cir., 1973), 472 F. 2d 1026. But, *Chouest*, like *Swift*, did not address itself to what Congress actually intended in the circumstances. While it may be noble to discuss fairness and equity, the protection of lawyers operating on the contingent fee basis and the preservation of the contingent fee system, so that a greater percentage of the community might have access to the Courts (18a-19a); those considerations are hardly pertinent to the determination of how Congress intended the entire compensation scheme to work.

## POINT IV

### Congressional Intent And The Compensation Scheme Is Best Preserved By Permitting An Employer Complete Control In Efforts To Recoup Its Lien.

In spite of the notion expressed by some Courts, that the 1972 Amendments to the Act remove any conflict of interest between an injured plaintiff and his employer, it is not altogether true. The Court of Appeals for the Fifth Circuit recognized this in *Chouest* (supra). Judge Wisdom, at 472 F. 2d 1032, noted that the 1972 Amendments "... reduced, 'though not entirely removed, the conflict of interest between the plaintiff and the intervenor . . .". He continued

> "But a conflict may persist as to the extent of the injured longshoreman's disability. Section 33(f) of the LHCA, 33 U.S.C. § 933(f) (1972), permits a longshoreman to assert a further claim for compensation after the conclusion of the third-party action if the recovery from the third party, together with the

amounts already paid in compensation, falls short of the amount to which the longshoreman is entitled under the LHCA. For fear of being liable for further compensation payments, then, an intervenor in the position of Travelers even after the 1972 amendments would have to minimize the longshoreman's disability. Thus the plaintiff and the intervenor will be united on the question of liability but opposed on the question of damages."

On a more practical level, however, the conflict persists. The employer who is forced to pay plaintiff's attorney in effect has a lawyer, not of its own choosing, and a fee arrangement, not of its own bargaining, forced upon him. The employer's essential interest in any third party litigation is the recoupment, in full, of its lien. The plaintiff's lawyer must ethically have as his prime consideration a benefit to his client, the plaintiff. Under no circumstances, therefore, could litigation involving circumstances of doubtful liability be compromised for a figure at or near the amount of the lien. To do so, obviously, would be of no benefit to the injured plaintiff and thus, the litigation will tend to progress in spite of the wishes of the employer.

Furthermore, the fee arrangement which prevails in most personal injury litigation is a contingent one—in the average of about one-third on any recovery. Might not corporate entities who employ longshoremen be able to bargain for better fee arrangements? It is common place that most such employers have counsel on their house staff or, alternatively, their insurance carriers have house counsel. Depriving employers of bargaining for better fee arrangements by forcing them to pay plaintiff's lawyers is hardly doing justice to congressional intent and preserving resources needed to pay injured workmen the benefits required by the Act.

In any event there is not one shred of evidence in the Act, its congressional history or in any decision that justifies the conclusion that Congress intended that an attorney should be paid out of funds which rightfully belong to the employer of an injured worker when the attorney conferred no benefit upon that employee. Any rule which makes a lawyer, not an injured harbor worker, the sole beneficiary has no congressional sanction. See Brown C.J. dissenting in *Strachan Shipping Company* v. *Melvin*, 5 Cir., 1964, 327 F. 2d 83, 86.

## Conclusion

The Order of Judge Weinstein dated June 24, 1976, should be reversed and judgment entered awarding McGrath priority of lien to the amount on deposit in the Court.

Respectfully submitted,

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*Attorneys for Intervenor-Appellant*

Martin J. McHugh
James M. Kenny
*Of Counsel*

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

VALENTINO

VS

RHEDEREI

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NY , ss:

BERNARD S. GREENBERG, being duly sworn,
deposes and says that he is over the age of 21 years and resides at 162 E. 7th Street NY, NY

That on the 30th day of september, 1976 19 at
he served the annexed brief of interveniro appellant McGarath corp upon
Irving B. Bushlow, 26 Court Street, Brooklyn, NY
in this action, by delivering to and leaving with said attorney two true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 30th
day of september, 1976 19

Bernard S Greenberg

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977